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The lawyer as amicus curiae

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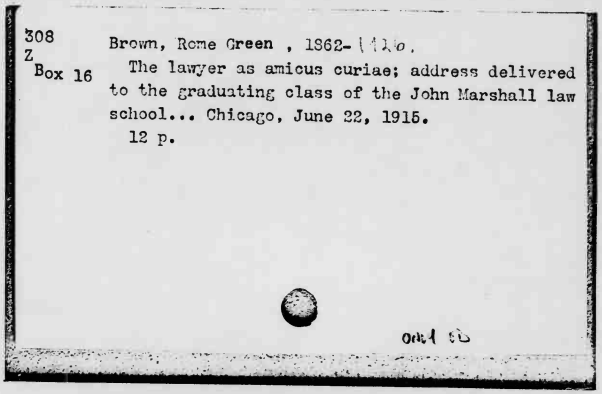
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THE LAWYER AS AMICUS CURIAE

ADDRESS DELIVERED TO THE
GRADUATING CLASS OF

The John Marshall Law School

By ROME G. BROWN, Esq.,

CHAIRMAN COMMITTEE OF THE AMERICAN BAR ASSOCIATION
TO OPPOSE JUDICIAL RECALL

CHICAGO
JUNE 22, 1915

The Lawyer as Amicus Curiae

It is my purpose, at this time, to make a somewhat unusual application of the term which has been set down as part of my subject. In the earlier English courts of justice, as today in both English and American courts, the lawyer was, in a sense, a part of the court itself. He was an officer of the court and, as such, had certain duties and privileges beyond those arising from his position of advocate in a pending case. If, as to the law or as to the facts involved in the issues then before the court, he, happening to be present, detected some misapprehension on the part of the presiding magistrate, it was his privilege to make suggestions, not as a partisan, but as "amicus curiae"—a friend of the court. This function is extended today to the granting of the privilege to lawyers, not of record in the case, of participating in argument and of filing extensive briefs, upon questions both of fact and of law.

This peculiar function emphasizes the fact, that the duties and privileges of the lawyer extend beyond his mere capacity as paid representative of the litigant whose retainer he has received. At all times he owes to the courts, as the administrators of the law, a higher professional obligation. With the judge, he is the administrator of the law. With him, as with the court, the law is a science, to be applied consistently and equitably to particular cases. Of course, we are speaking of the lawyer who has the highest sense of his professional opportunities and obligations. We are speaking of the one who recognizes the profession of the law as a science. The distinction is too often overlooked, and especially by young lawyers, that the profession of the law has for its object the study and development of a science, and that it is not the mere practice of a craft. To some extent the lawyer must partake of the nature of a craftsman. He must be ready to work out the particular problems presented by those who engage his services. Loyalty and efficiency to those whom he represents

are among his first obligations. For his skill and effort in their behalf he is entitled to receive proper remuneration. But the lawyer who views his calling as merely a craft which promises only to yield to him financial return, has a most inadequate, indeed ignoble, view of his profession. And let me say, right here, that, if any of you have chosen this course with the main view of the monetary returns which you may think the profession of the law promises, you have made a mistake. If you view the time and expense of your preparation as an investment merely for future cash returns, you are not only reasonably sure of disappointment but, what is more important, you are liable, even if your sordid hopes are realized, to disappoint the expectations of those who better appreciate the opportunities which, from now on, are open to you.

As to each of you: Are you to limit your field of professional work to that of a mere craftsman, working at so much per job, or at so much per day? Or are you also to devote your learning and your expert skill, as they develop in you through hard study and hard experience, to the science of law itself and to questions which are greater than those involved between one litigant and another? Are you also to be "a friend of the court," and in a broader sense than was he who, in olden time, helped to guide the judicial magistrate to a correct decision in a particular case? Will you be prepared and ready, from love of science of the law, unselfishly to devote time and effort to needed reforms in the administration of justice and to combat lawlessness, in whatever form it may appear? Only thus will you fulfill the highest functions of the lawyer and become truly successful and honorable in the profession which you have chosen.

THE FIELD OF THE LAWYER'S ACTIVITY

I have already referred to the distinction between the law as a science, to which its exponents give some of their time and effort in unselfish devotion, and the law as a mere craft, adherence to which is sought and maintained only as a means of livelihood or of financial gain. The latter view confines its thought to the day.

It may bring riches, but riches, not with honor,—much less with fame. Fame, which riches cannot buy, comes only from love of duty, from unselfish devotion to the science or art of the devotee. What if Michael Angelo had viewed the exercise of his artistic talents as the working of a mere craft? It was the inspiration arising from his unselfish devotion to religious art, which made the fame of his work extend beyond the limit of the few years of his life. So with Harvey, and with others famous in the science of surgery and of medicine. So with Edwards, Channing, and Brooks, in the profession of the ministry. None of you, perhaps may become a Marshall, a Kent or a Lincoln, a Sumner or an Edmunds, a Choate, a Root or a Taft; but you may, through emulation of these and of other famous lawyers of the American Bar, set high the goal of your ambitions. Devotion to your profession and to the law will surely bring honor and the more precious richness of unselfish accomplishment.

The lawyer has many opportunities and duties outside of those connected with his purely professional practice. His duty involves not only that which is incumbent upon every citizen, but he is peculiarly the guardian of the law. He owes it to his profession from the time he first enters the bar to make the law, its precepts and its practice, worthy of respect. There are those in high places, who recklessly heap censure upon the courts of this country and upon the lawyers as a class. One ex-president scoffs at the profession of the law and pretends to regard lawyers as obstacles to progress. If progress means change for the mere sake of change, and an adoption of suicidal specifics under the guise of remedial reforms, such as are some of those prescribed by this reactionary progressive, his pretended scorn of lawyers is a compliment to our profession. We are sometimes best graced by the enemies we have made. Quite in contrast with this political acrobat, whose genius of energy and whose effrontery are unparallelled in history, is that sturdy, logical and convincing professor of law, graduated also from the executive chair of the nation, whose consistent, judicial fairness and sanity have turned his defeat at the polls into the victory of having established himself as America's most eminent citizen. He is the American leader of that

profession as to which the sneering voice from the jungle, a year or so ago, said:

"No people have permanently amounted to anything whose only public leaders were clerks, politicians, and *lawyers.*"

This from the self-styled naturalist whose great achievement made him a second Burbank when he turned the Bull Moose into a goat.

As against which sneer Mr. Moorfield Storey, the Nestor of the New England bar, recalls the names of Hamilton, the Adamses, Jefferson, Marshall, Lincoln, Sumner, Cleveland, and Taft, in this country. He shows that the members of our profession have ever been the champions and defenders of liberty, recalling the names of Cicero and Mazzini, of Grotius and Barneveldt, of Turgot, Danton, Thiers and Gambetta, Coke, Hampden, and Burke, of Grattan and O'Connell. And Mr. Storey replies:

"No people have ever permanently amounted to anything among whose leaders great lawyers were *not* conspicuous, and among whom respect for the law was not a controlling force." (Reform of Legal Procedure, page 11).

The Chief Justice of the Supreme Court of North Carolina has persistently allied himself with the socialists, through his notorious achievement of having become a muckracker of our Constitution and of the American judiciary. He preaches the socialist doctrine, that the established function of the courts, to declare invalid statutes which contravene constitutional limitations, is a function which has been "usurped" by the courts themselves and he characterizes decisions of the Federal Supreme Court as "subtle perversions of the law" and the reasoning of those decisions as mere instances of "sardonic irony" and of "adding insult to injury." We need only to read the decision in *Marbury v. Madison,* enunciated by that great jurist whose name honors your law school, to find an answer, full and convincing, to all the vituperative attacks upon our institutions in which this modern Quixote of judicial reform has indulged himself. Justice Clark's addresses and published writings would make orthodox chapters in the creed of the socialists, or consistent editorials in their organ "The Appeal to Reason," or in the anarchist organ "Mother Earth." Occupying a

high judicial position, he is in fact lending himself to the promotion of lawlessness in its worst form.

The field, then, of the lawyer's activity is unlimited. He has every duty of the citizen, and special duties besides. It is not, however, of the lawyer as a general promoter of reforms that I wish to speak. I would call attention today to two phases of the higher professional work of the lawyer to which his attention is made necessary at the present time. The one is constructive, involving the advocacy and promotion of really progressive reforms; and the other involves the repression of reforms, so-called, but which are, in fact, the expression of a prevalent disposition to lawlessness.

REFORMS IN THE ADMINISTRATION OF JUSTICE

"Of all the questions that are before the American people," says Professor Taft, "I regard no one as more important than this, to-wit: The improvement of the administration of justice."

There is a crying need for constructive reforms, not only in the organization of the courts, federal and state, but in legal procedure. "The law's delay" is not a fiction, although its evils are too much exaggerated. Traditional technicalities have become obstacles to the administration of justice. Betterment of conditions has been attained through improved rules of practice, and, in some instances, by legislation affording partial remedies of limited scope. The congestion of the court calendars, however, still continues, and the proper expedition of litigation is prevented. The evils are more radical than can be met by any piecemeal treatment. The best thought of the American bar is today centered upon the solution of remedies for the deplorable situation, which must be met separately in each State. The task presented requires the highest and best talent of our profession. Every member of the bar should cooperate to the fullest extent possible in the formulation and adoption of measures necessary to perfect the organization of the courts and to accomplish the needed reforms in legal procedure. It is a work set before the lawyers, and that means you, to participate in the efforts which

have been started to bring about these reforms. It is a work which is remunerative only in the satisfaction of the results obtained; but in its participation are involved the highest professional duty and privilege of the lawyer. I commend your earnest attention to these constructive reforms.

THE REPRESSION OF LAWLESSNESS

The highest professional work of a lawyer is not, however, confined to constructive, progressive reforms. He must combat lawlessness. I do not here refer to defiance or disregard of the law in the ordinary sense of those terms. Through the propaganda of unrest which has been prevelant, more than at any other time, during the past few years, and which still persists, the mental attitude of the American electorate toward our fundamental law has become distorted. Public opinion, that great arbiter, has at times and at places, been made to assume a form which in reality is merely a disguise. The sober, deliberate conviction of the citizenship has, at certain times and in certain localities, been repressed by the temporary intensity and activity of disciples of error. Public opinion has been over-awed by the very force of reiteration of fallacies, until fallacies are taken as axioms. Vital truths have been lost, for the time being, in the maze of misleading doctrines forcefully and dogmatically enunciated; and the temporary or local numerical majority is mistaken as expressing what is in fact public opinion. But, as President Lowell of Harvard, ("Public Opinion and Popular Government," pages 13-14) says:

"Public opinion is not strictly the opinion of the numerical majority, and no form of its expression measures the mere majority, for individual views are always to some extent weighed as well as counted. Without attempting to consider how the weight attaching to intensity and intelligence can be accurately gauged, it is enough for our purpose to point out that when we speak of the opinion of a majority we mean, not the numerical, but the effective majority.

* * *

Public opinion to be worthy of the name, to be the proper motive force in a democracy, must be really public; and popular government is based upon the assumption of a public opinion of that kind. In order that it may be public, a majority is not enough, and unanimity is not required, but the opinion must be such that while the minority may not share it, they feel bound, by conviction, not by fear, to accept it; and if democracy is complete, the submission of the minority must be given ungrudgingly."

THE LAWLESSNESS OF SOCIALISM

Using the term in its proper sense, as applied to the ultimate ruling force in a democracy, public opinion in America repudiates socialism; and this is true, without exception as to any locality, despite the fact that here and there at times the majority have voted in favor of socialist candidates or of socialist measures. The main features of socialism are features of lawlessness; and, when properly weighed, no American community has ever really approved the lawlessness of socialism. It is, however, the most active and persistent of the dangers which threaten our constitutional form of government. Socialism contemplates a reorganization of our government which would involve the elimination of all constitutional safeguards to life, liberty and property. It would establish a government by the whim and caprice of majorities, unrestrained and unchecked by any fundamental law. It would replace our government of law with a government of men. Despairing of such change in our form of government by any direct or deliberate process, the socialist seeks to accomplish his ultimate object by insidious and gradual encroachments upon the bulwarks of our form of government. He would remove, one by one, the barriers which have been so carefully constructed and maintained to protect the person and property of the citizen against arbitrary oppression or confiscation by majority vote. He preaches openly that the right of private property is a right which has been "stolen" or "usurped" from the people. He even maligns the Constitution and the Declaration of Independence, as drafted by "robbers," who, by these instruments, established the institution

of private property for the purpose of indulging their own selfish greed and for the destruction of the rights of the common people. The right thus "stolen," the socialist teaches, no citizen has any duty to respect, for, as he asserts, confiscation of private property rights by the arbitrary will of the majority, if such will could be enforced, would involve merely a return of property to those from whom it had been wrongfully taken.

Recognizing the fact that the restraints upon his contemplated repudiation of the rights of property and of persons are, under our form of government, safeguarded by the judiciary, through the function of the judiciary to declare confiscatory statutes unconstitutional and unenforcible, and further recognizing the fact that this judicial function can only be effectually performed by a judiciary which is independent and which is kept free from the arbitrary control of the temporary passion and caprice of majorities, the socialist becomes the proposer and advocate, first and last, of those measures which are intended to undermine the independence of the judiciary and thereby to eliminate those protective restraints upon legislation which are the characteristic features and merits of our fundamental law.

THE JUDICIAL RECALL

It is not necessary today to enter upon a detailed argument to show that the Judicial Recall is essentially an instrument of socialism. It is so declared by the socialists in their leading organ, where it is designated as "the means by which we shall inauguarate socialism;" and so in the Socialist-Labor platform, where the Judicial Recall first appeared in any form in this country as a political doctrine. It is a measure springing from socialism, advocated only by socialists, and, manifestly, the only instrument by which the socialist doctrine, of subjecting life, liberty and property to the arbitrary and unrestrained whim of majorities, can be effectively established.

This sort of socialism is lawlessness. The Judicial Recall, whether in the form of the recall of judges or of the recall of judicial decisions, is an expression of lawlessness. These measures are lawless, because their avowed purpose is antagonistic to our fundamental law; and not only that, but because their purpose is to eliminate the very basis of our form of constitutional government and of our American social system, which rest, as stated by the Federal Supreme Court, "upon the sanctity of private property." The Judicial Recall is lawless because it seeks to eliminate by indirection all the protective features of our Constitution. It is lawless, therefore, because it is destructive of our form of government.

Can any lawyer, therefore, whose duty it is to repress lawlessness, more effectually aid in the maintenance of law than by opposing this insidious and dangerous fallacy? I have said that the Judicial Recall is advocated only by socialists. Many prominent citizens have lent their influence to this subversive doctrine who would repudiate the title of "socialist." Let each label himself as he will,—"naturalist-explorer," "Chief Justice of a State Supreme Court," "professor of history," "dean" of a law-school, "new-nationalist," or by any other name, they are, each and all, nevertheless, socialists. They are more socialist than the socialists themselves, for many of them lend to the socialist cause the force of a prestige, from past or present rank, as no avowed socialist could do.

NOT A DEAD ISSUE

The Judical Recall is by no means as yet a dead issue. Its opponents believe that it has become discredited throughout the country, and this even in States where it has been adopted in some form. It is significant, however, that the recall of judges has become a part of the constitutions of seven States, and that also in Colorado the constitution provides for the recall of judicial decisions. At the last fall elections Kansas adopted the proposal of its legislature of 1913, to incorporate into its state constitution a provision for the recall of judges. The defeat at the same time of a similar proposal, submitted in Minnesota, is encouraging, especially in connection with the fact that the Minnesota legislature of 1915 refused to re-submit such a proposal. Reports

from the different States indicate that, with the exception of Kansas, there has been no progress in Judicial Recall during the past year, and that the votes in the different legislatures, where it has been discussed, show a diminished support.

The opportunity for a young lawyer to start right in the work of his profession is shown by the campaign against the Judicial Recall which was made last fall in Minnesota, when the constitutional recall amendment lacked about 40,000 votes of the number required for its passage. The campaign pamphlet there used against the proposed amendment consisted of two prize arguments against the recall, the one by a senior student in the law school of the University of Minnesota, and the other by a student of one of the high schools of Minnesota. These arguments were of such excellence that it was not deemed necessary to distribute any other literature. They brought home to the citizens of the State the views which two of their intelligent sons had taken after careful study of the subject.

THE DECISION RECALL IN COLORADO

You will be interested, I am sure, in the practical demonstration which is made in Colorado of the absurdity of the judicial decision recall. The constitutional amendment which provides for the recall of judicial decisions allows certain cities, by a majority vote of their citizens, to recall a decision, even of the State Supreme Court, which shall declare unconstitutional a provision of a city charter. A certain city charter provision, therefore, if found to have the effect, in any particular case, to confiscate private property, or to have any other unconstitutional effect, may be declared unenforcible by a decision of the courts and that decision may be reversed and the charter provision retained as enforcible, by a majority vote of the electorate of the city in question. A city may decide one way today and another way tomorrow in regard to the same question. And as to the same or similar charter provision, one city may decide one way, and at the same time another city another way. All consistency in the administration of the law is thus destroyed.

A recent example is significant: Denver is one of the cities permitted by the Judicial Recall amendment to recall, by a majority vote, a Supreme Court decision involving the enforcibility of a city charter provision as against the state constitution. That constitution provides for prohibition throughout the State. The "Wets" are in a majority in the city of Denver. In the contest which is now on between the "Wets" and "Drys" of Denver, the Supreme Court of the State will probably hold the constitutional state-wide prohibition clause to apply to Denver; whereupon the "Wets," within the city will invoke the decision recall and, by submitting such decision to the electors of the city, will doubtless bring about its reversal. Many prohibitionists in Colorado have heretofore strenuously advocated the judicial-decision recall as adopted in 1912. They now see that it may result in at least a partial failure in Colorado of the prohibition movement; and, further, that local option has been established, not only in respect of the liquor question, but also in respect of the question of the enforcibility of the decisions of the highest court of the State.

POSSIBILITIES OF REVIVAL

The persistence of this fallacy presents many possibilities of its revival, in one form or another. Within the past year the American Judicature Society, which has its headquarters and active officers in this city, has in the course of its work "to promote the efficient administration of justice," issued a bulletin which treats of proposed reforms in the organization of the courts. It proposes the abolition of the elective system of judges, and then, as a sop to the lingering predilection in favor of Judicial Recall, it is proposed to add to the present method of retirement of judges through impeachment, not only the right of removal, upon charges, made and adjudicated, by the State Legislature and by a Judicial Council, but also the retirement by a fourth method. By this fourth method it is proposed to submit to the electorate at certain intervals of time the question "shall ———— (naming the judge), be continued in office?" If the vote is in the affirmative, the judge remains in office. If in the negative, then the judge

goes out of office and the vacancy is filled by appointment as in the case of original selection. It is argued that this last proposition is not in reality a Judicial Recall and that it merely preserves the present periodic power of retirement, existing under the elective system, at the same time that it eliminates many of the objectionable features of that system. That such a measure should be proposed by any society whose active members comprise well known lawyers, is significant of the extent to which the Judicial Recall fallacy has taken hold. It shows that Judicial Recall is dead only in spots. This proposition concedes too much to socialism. It prescribes a poison in modified regular doses for the purpose of curing those who have become addicted in a dangerous degree to a deadly narcotic. It is a remedial tapering off, a sort of conciliatory concession, under the guise of a remedy, to a vicious appetite which had temporarily seized upon the electorate. Logically it is impossible: and we should see to it that the American Bar is not caught in a proposition to remedy the organization of the courts by the disorganization of constitutional government involved in any measure which gives over to the electorate the arbitrary power, without a hearing, to retire a judge during the term of office for which he has been elected or appointed.

There are many other opportunities for the exercise of your ingenuity and enterprise, your skill and your learning, in behalf of the public welfare. Enter upon your work with the determination to be in the broadest sense of the term a "friend of the court." Help to promote constructive reforms in the administration of justice. Keep in mind that progress means change, but that change does not necessarily denote progress. Do not shrink from innovations, but examine and deliberate over proposals which are presented under the guise of remedies or reforms, from whatever source they come. Distinguish between those which are really remedial and those which are, when analyzed, subversive. As antagonists of lawlessness, mark those measures for your fiercest and most persistent attack, which involve, either directly or indirectly, the elimination of the constitutional restraints and limitations which have made our Government, as it is termed by Bryce, "the first true Federal state founded on a complete and scientific basis."

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